

Keep facts from patients at your peril, Ontario court warns doctors

Karen Capen

Résumé : Les circonstances entourant une affaire judiciaire récente en Ontario ont mis en lumière la responsabilité légale du médecin de communiquer à un patient des renseignements au sujet de sa condition, ainsi que les paramètres légaux entourant le privilège du thérapeute au Canada. Kenneth Pittman, de Toronto, a été infecté par le VIH après une transfusion sanguine en 1984, mais n'a pas été informé de sa condition même si son médecin, le Dr Stanley Bain, en a été informé dès 1989. Après le décès de Pittman en 1990, sa femme Rochelle a découvert qu'elle était infectée au VIH. M^{me} Pittman et ses quatre enfants ont intenté des poursuites et le tribunal a jugé que le Dr Bain avait fait preuve de négligence.

with blood from a donor who subsequently tested positive for HIV antibodies. In 1989 Dr. Stanley Bain, Pittman's family physician, was advised of this through a "look-back program" intended to identify recipients of potentially tainted blood products. Bain, who had treated Pittman for several years, decided not to disclose the information to him for several reasons:

- Although there was a chance his patient was HIV positive, he had checked for symptoms and found none;

- In considering the risk of transmission of the virus to his patient's spouse, he concluded on the basis of notations in the medical record that his patient was abstaining from sexual activity; and

- He was concerned about Pittman's ongoing depression and the possibility that such information

could adversely affect his heart condition.

In 1990, after her husband died of an AIDS-related illness, Rochelle Pittman discovered that she was HIV positive. She and her family decided to take legal action, and a suit was brought against Bain, the Canadian Red Cross Society and the Toronto General Hospital. The court found the Red Cross liable for failing to monitor the hospital's look-back program, and the hospital liable for not following up with Bain. Both were also found negligent for not making sure that Bain had enough information to enable him to give an adequate warning to Mr. Pittman.

Damages were sought from Bain because it was alleged he had fallen below the appropriate standard of care by deciding to withhold from Kenneth Pittman information about the potentially tainted transfu-

A recent Ontario court case has shone a spotlight on physicians' legal responsibility to disclose information to patients, and on the legal parameters surrounding therapeutic privilege.

The facts are well known. During a 1984 heart operation, Kenneth Pittman of Toronto was transfused

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sion. In her ruling, Ontario Justice Susan Lang considered Bain's duty to Mr. Pittman and his possible duty to Mrs. Pittman. (Any finding of negligence has to be based on the negligence causing harm to a person to whom a duty is owed.)

Lang ruled that a doctor can withhold information only in certain exceptional circumstances. She said the evidence indicated that Mr. Pittman wanted to know about his medical status, cardiac or otherwise, and that Bain did not do enough to ensure that Pittman's emotional state precluded his ability to receive bad news. "In any event, absent careful consideration of Mr. Pittman's mental state, it cannot be said that he fit within the category of patient where the doctor's duty to disclose is abrogated."

The judge also considered whether Bain could be relieved of his duty to disclose if Pittman's physical health was so precarious that the disadvantages of disclosure outweighed the advantages. She found that Bain did have an obligation to tell Pittman of his risk of HIV infection. She also stated that it was therefore unnecessary to determine if Bain had an independent duty to Mrs. Pittman because the evidence had established that if Bain had told Mr. Pittman, Mr. Pittman would have told his wife.

"For all these reasons then, Dr. Bain's conduct was negligent in failing to confirm that Mr. Pittman's depression precluded him from receiving bad news; in failing to confirm that there was no sexual activity between [him] and his wife; in failing to enquire [adequately] as to possible treatment or prophylaxes; and in failing to monitor [carefully] Mr. Pittman's health over the remaining months of his life.

"In the absence of taking such reasonable steps, Dr. Bain was under an obligation to disclose the information about his potential HIV to Mr. Pittman."

Monetary and nonmonetary damages awarded totalled just over \$515 000, to compensate Mrs.

Pittman for her pain and suffering, loss of past and future income, and the cost of her future care. Bain was found to be 40% liable for her illness.

Did Bain's intentional failure to warn affect his patient's ability to give informed consent? The law requires that informed consent be given by a patient for any procedure or treatment provided by the attending physician. The acts of informing and disclosing refer to both the patient's actual condition and to the nature, gravity and material risks of any proposed treatment or procedure.

The patient's right to know is not limited by what is usually done or explained by physicians in general. The duty since *Reibl v. Hughes* transcends the medical profession's interest in setting its own standards for disclosing information to patients, and today should include an appreciation of the patient's particular circumstances.

Mr. Pittman was unable to give his consent because Bain did not tell him of his possible risk of HIV infection and that, if he tested positive, some accepted treatments and preventive measures were available that might allow him to live healthier and longer. (It may be that, by implication, consent must also be given by the patient for nontreatment of a suspected disease or condition.)

On the issue of withholding information from a patient — this is referred to as "therapeutic privilege" — expert witnesses for both the Pittman family and Bain presented differing interpretations.

The Pittmans relied on expert evidence from Dr. Philip Hébert, a physician at Toronto's Sunnybrook Hospital and bioethics coordinator of the undergraduate curriculum at the University of Toronto. He said Bain's decision not to inform Mr. Pittman of his risk of HIV infection fell well below the standard of care expected of a family physician in 1989 and 1990.

He acknowledged that there is

an exception to the obligation to disclose significant information and it may arise when the patient is in an emotional state so severe that safe communication would be impossible. However, he added that the exception is not permanent and the physician has an obligation to re-examine the issue regularly.

Two other physicians appeared for the defence. Dr. Donald Butt, an experienced family physician, supported Bain's 1989 decision. He said that although Pittman was at risk of infection — the risk was estimated to be 37% — Bain had considered his patient's history, consulted internists and had used his knowledge of Pittman's emotional makeup to conclude that disclosure would be harmful. However, he agreed that further steps, such as inquiries into Pittman's sexual activity, could have been taken by Bain.

Dr. Brian Hennen, a professor of family medicine at the University of Western Ontario, said that Bain had acted in a reasonable manner consistent with the standard of care applicable to a family physician of his experience in 1989. He said that Hébert's analysis had been too intellectual and theoretical, and that physicians are rarely able to make decisions in the manner he described.

Hennen also argued that the more seriously ill a patient is, the more the patient prefers the doctor to make treatment decisions. Although he supported Bain's decision not to disclose the risk to Pittman, Hennen conceded that had prophylactic treatment been available, Bain would have had a duty to disclose.

The judge did not find either of Bain's expert witnesses offered much to support his case. Both Butt and Hennen had finally agreed that Bain had not taken a number of additional precautions that might have been indicated.

In discussing therapeutic privilege, the judge based her reasoning and decision on two issues: Was it reasonable for Bain to decide that

Pittman was too depressed to receive the information? Was it reasonable for Bain to conclude there was no risk to Mrs. Pittman?

Based on the judge's finding that prophylactic treatment was available, it was held that Bain's decision to withhold information fell below the standard of care of a reasonable and prudent family physician of his experience. In concluding that Pittman's circumstances did not bring him within the therapeutic-privilege exception, and that Bain's monitoring of his patient did not satisfy the requirement of "watchful waiting," the judge stated: "Even if Dr. Bain had the right to withhold the information, he then had an obligation to monitor [carefully] his patient's health, an obligation to which he did not apply his usual skill and competence."

Physicians can use this judgement as a guide for future cases involving the therapeutic-privilege exception:

- Even if the news about a patient's health is bad, a patient is entitled to know the prognosis;
- In the event a patient's condition, emotional or physical, is seen to be so precarious as to preclude the relaying of bad health news, physicians must demonstrate that they

have carefully weighed the disadvantages of disclosure against the advantages of informing the patient and providing possible treatment or other care;

- When patients appear to be unable or unwilling to accept bad news, the physician is obliged to take reasonable precautions to ensure that the patients have communicated the desire *not* to be told; and

- If patients' emotional or physical health is so precarious that such bad news would trigger an adverse reaction and possibly preclude their ability to be told, physicians should take necessary steps to confirm the extent of the precarious condition and its possible duration, and where indicated they should propose treatment in an attempt to, at the very least, alleviate some of the relevant symptoms.

In looking at the issue of informed consent, the Supreme Court of Canada (in *Reibl v. Hughes*) anticipated the need for a physician to vary (on a discretionary basis) information given to patients about their conditions and possible treatments. The court acknowledged that physicians must weigh the requirement to provide detailed information with the presence of an emotional condition that may indicate such informa-

tion should be withheld, or at least presented in a generalized way. It is always recognized, however, that the patient's right to be informed takes precedence over any exercise of discretion.

It is, perhaps, clearer after the Bain case that Canadian courts will take a very restrictive approach to the therapeutic-privilege exception. The key point is that therapeutic privilege is not a permanent exception, and physicians must remember to re-examine regularly their reasons for making such an exception for a patient.

There is one other important point. On the basis of a 1991 Ontario case, *Meyer Estate v. Roger*, it appears necessary to look at this exception as it applies to each medical specialty. After that case, the Canadian Medical Protective Association advised that there is no therapeutic-privilege exception for radiologists.

[This column is offered for information purposes, and is not to be construed as legal advice. Physicians with specific questions should contact their lawyer or the Canadian Medical Protective Association. The column is prepared with the assistance of the CMA's Department of Ethics and Legal Affairs.] ■

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